IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 25.

SUTPHEN ESTATES, INC.,

Appellant,

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF WARNER APPELLEES.

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Statement.

No facts were alleged in the petition below, and none has here been suggested, to show that the guaranty tendered by the New Theatre Company was not a proper equivalent for the present guaranty of the integrated company, consistent with the basic purpose of divorcement sought by the Government and ordered by the Statutory Court below and affirmed by this Court.

The Statutory Court which has had to struggle for so long with this complicated situation should not

have its discretion disturbed as to the extent to which the relief sought by Appellant might tend to weaken or impair the effectiveness of any appropriate remedy.

If these considerations are not in themselves controlling, Appellant is faced with the additional hurdle that, under the circumstances here, this application was not timely within the meaning of the Federal Rules of Civil Procedure.

I.

Under the circumstances, the application was not timely.

Appellant did not make "timely application" for intervention under Rule 24 (a) and (b) of the Federal Rules, because the relief which it asked in its tardy 1951 application was inconsistent with the Government's basic claim: since the inception of this action in 1938, the remedy sought by the Government was total divorcement of theatre operation from production and distribution, and this was the position which the Government consistently urged on the Statutory Court.

Appellant asked below (and here) relief which would have impaired or weakened the divorcement sought by the Government and ordered by the Statutory Court below and affirmed by this Court.

Appellant's claim was and is that any decree which divorces its ninety-nine year theatre guaranty from the production and distribution business will

adversely affect its guaranty. Its petition below prayed for a guaranty "which shall include an assumption of said guaranty obligations jointly and severally by the two new transferee corporations proposed to be formed" (R. 41). Its brief here states that "The substitute prayed for is the guaranty of both new companies * * *" (p. 14).

Appellant's petition, dated January 2, 1951 (R. 41), was made over twelve (12) years after the Government had brought this action in 1938, seeking divorcement of theatres from production.

It knew, or should have known, since 1938, that the outcome of this action might affect its theatre guaranty, and that, if the Government's contentions as to the Anti-Trust Laws were upheld, a production company might no longer be permitted to have any financial stake in any theatre, directly or indirectly.

Since the inception of this action in 1938, the Government has insisted that divorce be decreed against the integrated motion picture companies.* Before Appellant sought intervention there had been two opinions and decrees of the District Court, two appeals to this Court, and the entry of two consent judgments against other defendants.

When this Court in 1948 reversed a decree of the District Court with instructions to make a new start on the issue of divorcement, Appellant should have realized that such relief was more than a mere possibility. The entry of consent judgments of divorce and dissolution against RKO in 1948 and against

* In the Consent Decree of 1940 the Government merely agreed to a standstill period of three years during which it would not seek divorce.

Paramount in 1949, and the opinion of the District Court on remand in 1949 that divorcement should be decreed and plans therefor be submitted by September 20, 1949, constituted notice to Appellant to seek to intervene if it desired to assert the right to have the production company continue to have an interest in a theatre guaranty.

Appellant contends at page 15 of its brief that, although it knew that the February 8, 1950 decree compelled Warner to divorce, it did not know until shortly before the presentment of the Warner consent judgment that Warner would be required to transfer all of its assets to two new companies and to dissolve.

But the fact that the Warner consent judgment provides for dissolution to effectuate divorce does not alter the situation. For whatever the form divorcement had taken, Appellant would still contend, as it does, that it is entitled to a guaranty backed by all of Warner's assets. Moreover, similar dissolution of the parent company was provided in the consent judgments of RKO and Paramount entered approximately two years before.

To permit the Appellant to intervene at such a late date and secure what was not provided for under any of the Plans of Reorganization theretofore consummated would delay and impair the efficacy of the complicated reorganization which Warner was obligated to carry out.

Appellant did not make "timely application" as required by Rule 24 (a) and (b) of the Federal Rules of Civil Procedure.

II.

The petition alleged no facts to show that the guaranty of the New Theatre Company would not be a reasonable equivalent, consistent with the basic purpose of divorcement.

Appellant's lessee was a subsidiary with interests in a dozen of the 400-odd Warner theatres, the lease being guaranteed by the parent production and distribution company. Appellant therefore had no direct security as against the bulk of the 400-odd Warner theatres, and was subject to any hazards of the production and distribution business.

Admittedly, Appellant will have the guaranty of the New Theatre Company to which all the theatre assets will be transferred [Government's Br., p. 19, footnote 11, par. (4)].

The equivalent tendered, following the basic purpose of divorcement, divorces the guaranty from the production and distribution business, but is a guaranty by the New Theatre Company which will have, directly or indirectly, *all* of the Warner theatres. Moreover, such new guaranty is free of the hazards of the production and distribution business.

As the Government's brief points out (p. 20, footnote 12), the New Theatre Company will have total assets of $92,113,628, and capital stock and surplus of $80,432,375.

No facts were alleged which showed even a remote possibility that Appellant would not be protected as

well as it could be protected consistent with the letter and spirit of the Anti-Trust Laws as construed by the courts.

Exact equivalence of a ninety-nine year lease guaranty, upon which Appellant grimly insists, is impossible if the decisions of divorcement under the Anti-Trust Laws are to be effectively enforced.

The petition alleged no facts which indicate that the equivalence resulting from the Consent Judgment will cause Appellant to lose a single penny, and any surmise that its ultimate security may be lessened must stem, basically, from the separation of exhibition from production, *i. e.*, from what this Court has decreed is required by the Anti-Trust Laws.

An "equivalent substitute" cannot be a substitute which would impair the remedy deemed to be necessary under the Anti-Trust Laws, by tying for seventy-five years more the production-distribution business to the tail of exhibition under the guise of an "equivalent" guaranty. As the Government told the Statutory Court (R. 220):

> "Now we are unalterably opposed to that because the very purpose of this judgment is to effect a complete separation of the picture company from the exhibition interests and the exhibition company from the distribution and production interests. To put the picture company in the position of a guarantor of a theatre is to give it an interest in the success of that theatre and to give it an interest in the exhibition business."

III.

This Court should not disturb the discretion exercised by the Statutory Court as to the efficacy of the remedy which it deemed necessary fully to effectuate divorcement.

In denying the application, the Statutory Court undoubtedly considered the effect of Appellant's claim upon the proper enforcement of the Anti-Trust Laws, and rejected the propriety of a production company continuing for seventy-five years longer to be financially affected by the operation of a large Broadway theatre in New York City.

Questions such as the scope of the remedy appropriate under the circumstances, the extent to which relief sought by intervenor may tend to weaken or impair the effectiveness of any appropriate remedy, and the timeliness of a last minute application for intervention which might tend further to delay the end of a twelve-year litigation, were and are primarily for the Statutory Court which has lived with all its complicated problems.

Its resolution of such questions are entitled to consideration, including its denial of Appellant's tardy petition for intervention.

CONCLUSION.

The order should be affirmed.

Respectfully submitted,

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